

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**IT(SS)A No.44/Ind/2015
Assessment Year: 2007-08**

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| DCIT-1(1) Indore | <u>बनाम/</u> Vs. | M/s. Brilliant Sare Reality Pvt. Ltd. 17, Race Course Road, Indore |
| (Appellant) | | (Revenue) |
| P.A. No.AACCB9248A | | |

**C.O. No.45/Ind/2016
(Arising out of IT(SS)A No.44/Ind/2015)
Assessment Year: 2007-08**

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| M/s. Brilliant Sare Reality Pvt. Ltd. 17, Race Course Road, Indore | <u>बनाम/</u> Vs. | DCIT-1(1) Indore |
| (Appellant) | | (Revenue) |

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| Appellant by | Smt. Aashima Gupta, DR |
| Respondent by | Shri Ajay Tulsiyana & Shri Kapil Shah, A.Rs |
| Date of Hearing: | 24.10.2018 |
| Date of Pronouncement: | 28.12.2018 |

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal and cross objection pertaining to the assessment year 2007-08 have filed by the revenue and the assessee against order of the Commissioner of Income Tax (Appeals)-I, Indore dated 22.10.2014.

2. In cross objection the assessee has raised following grounds:

- 1. That the Learned CIT(A) erred in dismissing ground No.1 and in effect holding that the proceedings initiated u/s 153C and the assessment order passed u/s 143(3) r.w.s. 153C were valid and legal. That on the facts and in the circumstances of the case in law the proceedings initiated u/s 153C and the assessment order passed are wrong and not in accordance with law. It is prayed to quash the same.*
- 2. The Learned CIT(A) erred in holding that the assessment u/s 153C can be made even if no incriminating document was found and also erred in holding that normal disallowances and addition u/s 40A(3) are permitted to be made/can be made in these proceedings. The said observations are wrong and not in accordance with law.*
- 3. That the respondent craves leave to add, to alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of cross objection on or before final hearing, if necessity so arises.*

It is noted that the assessee has raised issue of legality of the proceedings initiated u/s 153C of the Income Tax Act

(herein after called as 'the Act). Therefore, the cross objection of the assessee requires to be adjudicated first.

3. The facts giving rise to the present appeal are that a search & seizure operation u/s 132 of the Act was carried out on 4.2.2009 in the cases of commonly known as M/s. Zoom Developers and Brilliant Estate. During the course of search, certain documents pertaining to the assessee company were found. Accordingly, a notice u/s 153C of the Act was issued on 15.12.2009. In response to the notice, the assessee has raised an objection. The assessee filed an objection dated 15.1.2010, wherein the legality of the notice was challenged. However, this objection of the assessee was not accepted and the assessment was framed, thereby the A.O. made addition of Rs.65,87,000/- in respect of cash payments amounting to Rs.32,93,500/-. Against this, the assessee preferred an appeal before the Ld. CIT(A), who after considering the submissions partly

allowed the appeal. Thereby the addition made by the assessing officer was deleted. However, the question of legality was decided against the assessee. In cross objection, the assessee has challenged the order of the Ld. CIT(A) in respect of rejecting ground taken against the legality of the proceedings u/s 153C of the Act. It is contended by the Ld. Counsel for the assessee that the assessment has not been framed in accordance with law. Before the A.O., the objection was raised that no incriminating material pertaining to the assessee was recovered and assessment is therefore not made on the basis of incriminating material.

4. On the contrary, Ld. D.R. has submitted that the submission and the objections of the assessee are ill founded. He drew out attention to LPS-1/42 in paper book page nos.2 to 199. He submitted that in view of these documents, the assessing officer was justified in initiating

the proceedings against the assessee. He contended that the grounds raised in the objections be rejected.

5. Ld. Counsel for the assessee in rejoinder submitted the vouchers pertaining to M/s. Brilliant Estates Pvt. Ltd. which is a different entity.

6. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We find that the submissions of the assessee are contrary to the records as the documents filed are the journal entries and some of the vouchers or debit notes which are belonging to the assessee. Therefore, under these facts, it cannot be construed that there was no incriminating material for initiating the proceedings u/s 153C of the Act. We therefore, reject the grounds raised by the assessee. Accordingly, the cross objection filed by the assessee is dismissed.

7. Now we take up the revenue's appeal in IT(SS)A No.44/Ind/2015. The revenue has raised following grounds of appeal:

1. *Erred in deleting the addition of Rs.65,87,000/- which was made on account of disallowance of cash payments u/s 40A(3).*
2. *Erred in deleting the addition while holding that the identity of sellers was disclosed. The Ld. CIT(A) has completely ignored that no such exception is prescribed u/s 40A(3) of the I.T. Act, 1961.*
3. *Erred in deleting the addition on the basis of practicability of business, while completely ignoring that the so called practicability is no justification in the eyes of law; and if this norm is applied, all the infringements of law would be legalised.*
4. *The appellant reserves the right to add, amend or alter the ground of appeal on or before the date the appeal is finally heard for disposal.*

8. The only effective ground is against deleting the addition of Rs.65,87,000/- by invoking the provisions of section 40A(3) of the Act.

9. Ld. D.R. supported the order of the A.O. and submitted that Ld. CIT(A) was not justified in deleting the addition as admittedly the assessee has made payment in cash and the case of the assessee does not fall in any of the

exception. He therefore, prayed that the finding of the Ld. CIT(A) be set aside and that of the A.O. be confirmed.

10. Per contra, Ld. Counsel for the assessee submitted that there is no finding that these expenses are not genuine. Some of the advances were paid in cash for the business expediency, rest of the payments were made through banking channel. He placed reliance on the judgement of the Hon'ble Allahabad High Court rendered in the case of CIT Vs. Choudhary & Company (1996) 217 ITR 431 (All). Further, reliance is made on the judgement of the Hon'ble Delhi High Court in the case of CIT Vs. Rhydberg Pharmaceuticals Ltd. 269 ITR 561 (Del.).

11. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The Ld. CIT(A) has decided the issue in favour of the assessee in para-6 of his order as under:-

6. Gr. No. 2 of appeal is against addition of Rs.65,87,000/- made u/s 40A(3) of I.T. Act being 20% of the cash payments of Rs.3,29,35,000/- of purchase of land. This is first year of operation of appellant and business object of appellant was to acquire land in order to develop residential and commercial township. During the year appellant has acquired land for construction of township and incurred various expenses towards it, which were shown as stock-in-trade. The AO observed that for purchase & registration of land appellant has incurred expenses of Rs.46,71,49,446/- out of which payment of Rs.3,29,35,000/- was made through cash or bearer cheques. The appellant explained before AO that it has only paid 'Bayana' or 'token money' to the sellers of land, in cash or through bearer cheques and all subsequent payments, which is the major payment is made through account payee cheques. According to appellant the first payment is required to be made in cash both due to prevalent practice in real estate market to make first payment through cash and also because of insistence of seller party to make first payment in cash because while making first payment they were unknown to each other. The appellant claimed that because of aforesaid reasons and also because they have not claimed such expenses toward land in profit & loss a/c, hence they are not hit by provision of Section 40 A(3) of the I.T. Act. On verification of the

facts, it is noticed that such amount of payment towards land has been reflected in balance sheet as stock-in-trade which is going to be claimed as revenue expense in future years in the profit & loss account. Hence on such expense, towards land purchase, provisions of Section 40A(3) of I.T. Act are squarely applicable. However the other argument of appellant is valid that since identity of payee is disclosed in registered sale deeds of these lands and genuineness of payments is also not doubted by AO, provisions of Section 40A(3) will not be attracted. When majority of payments out of Rs.46.71 crore were made through crossed account payee cheques for purchase of land and only Rs.5 lakh is paid through cash and Rs.3,24,35,000/- is paid through bearer cheques of the same bank (PNB) from which all subsequent payments were made through account payee cheques, appellant will not be hit by these provisions. Mere making of first payment in cash or through bearer cheque because while making first payment or token payment parties were unknown & sellers of land insisted for cash payment, would not attract provision of section 40A(3). For this purpose reliance of appellant on the decisions in cases of Choudhary & Co. (All.) 217 ITR 431, Rhydberg Pharmaceutical ltd (Del.) 269 ITR 561 and Magnificent Construction P. ltd [2013] 40 taxmann. com 306 (MP) is fully justified and accordingly the addition of Rs.65,87,000/- made u/s 40A(3) of I.T. Act. is hereby deleted. Gr. No.2 of appeal is allowed.

12. It is the case of the assessee that the payment in cash exceeding the monetary limit so prescribed was due to the business expediency as the sellers of the land insisted for making payments in cash. However, substantial payments were made through banking channel. It is contended that the assessee had no intention of evading tax. All transactions are genuine business transactions. The reliance is placed on various judicial pronouncements to buttress the contention that the provisions to be liberally construed. For the sake of clarity, the relevant provisions of section 40A(3) of the Act and Rule 6DD are reproduced as under:-

Section 40A(3):

“Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [or use of electronic clearing system through a bank account, exceeds ten thousand rupees,] no deduction shall be allowed in respect of such expenditure.”

Rule 6DD:

No disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3A) of section 40A where a payment or aggregate of payments

made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees in the cases and circumstances specified hereunder, namely:-*

- (a) *Where the payment is made to—*
- i. The Reserve Bank of India or any banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);*
 - ii. The State Bank of India or any subsidiary bank as defined in section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);*
 - iii. Any co-operative bank or land mortgage bank;*
 - iv. Any primary agricultural credit society or any primary credit society as defined under section 56 of the Banking Regulation Act, 1949 (10 of 1949);*
 - v. The Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956);*
- (b) *Where the payment is made to the Government and, under the rules framed by it, such payment is required to be made in legal tender;*
- (c) *Where the payment is made by—*
- i. Any letter of credit arrangements through a bank;*
 - ii. A mail or telegraphic transfer through a bank;*
 - iii. A book adjustment from any account in a bank to any other account in that or any other bank;*
 - iv. A bill of exchange made payable only to a bank;*
 - v. The use of electronic clearing system through a bank account;*
 - vi. A credit card;*
 - vii. A debit card.*

Explanation—For the purposes of this clause and clause (g), the term “bank” means any bank, banking company or society referred to in sub-clauses (i) to (iv) of clause (a) and includes any bank [not being a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949), whether incorporated or not, which is established outside India;

- (d) *Where the payment is made by way of adjustment against the amount of any liability incurred by the payee for any goods supplied or services rendered by the assessee to such payee;*
- (e) *Where the payment is made for the purchase of—*
- (i) Agricultural or forest produce; or*
 - (ii) The produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming; or*
 - (iii) Fish or fish products; or*
 - (iv) The products of horticulture or apiculture, to the cultivator, grower or producer of such articles, produce or products;*

- (f) Where the payment is made for the purchase of the products manufactured or processed without the aid of power in a cottage industry, to the producer of such products;
- (g) Where the payment is made in a village or town, which on the date of such payment is not served by any bank, to any person who ordinarily resides, or is carrying on any business, profession or vocation, in any such village or town;
- (h) Where any payment is made to an employee of the assessee or the heir of any such employee, on or in connection with the retirement, retrenchment, resignation, discharge or death of such employee, on account of gratuity, retrenchment compensation or similar terminal benefit and the aggregate of such sums payable to the employee or his heir does not exceed fifty thousand rupees;
- (i) Where the payment is made by an assessee by way of salary to his employee after deducting the income-tax from salary in accordance with the provisions of section 192 of the At, and when such employee—
 - i. Is temporarily posted for a continuous period of fifteen days or more in a place other than his normal place of duty or on a ship; and
 - ii. Does not maintain any account in any bank at such place or ship;
- (j) Where the payment was required to be made on a day on which the banks were closed either on account of holiday or strike;
- (k) Where the payment is made by any person to his agent who is required to make payment in cash for goods or services on behalf of such person;
- (l) Where the payment is made by an authorised dealer or a money changer against purchase of foreign currency or travellers cheques in the normal course of his business.

Explanation—For the purposes of this clause, the expressions "authorised dealer" or "money changer" means a person authorised as an authorised dealer or a money changer to deal in foreign currency or foreign exchange under any law for the time being in force.]

13. The Ld. CIT(A) had relied upon the decision of coordinate bench rendered in the case of CIT Vs. Magnificent Construction Private Limited in IT(SS)A No.83

to 85/Ind/2011 dated 7.6.2012 in which the Tribunal has held as under:

15. In terms of our discussion hereinabove in case of Magnificent Construction Private Limited, the addition was made by the Assessing Officer in case of Zoom Reality in the assessment year 2006-07 to 2008-09 in respect of cash payment made for purchase of agricultural land. By the impugned order, the Id. CIT(A) confirmed the addition after having following observations : "The CIT(A) has confirmed the disallowance by observing that where the land so purchased was as stock in trade and merely because the assessee has not accounted for such expenditure in the profit and loss account and corresponding closing balance, work in progress, has not been credited the profit and loss account, due to wrong presentation in the profit and loss account, the assessee cannot come out of the purview of Section 40A(3)."

16. We have considered the rival contentions and find from record payment so made was not claimed as expenditure

in the profit and loss account and, therefore, provisions of Section 40A(3) is not attracted. The assessee has also given undertaking to offer the disallowance u/s 40A(3), while claiming such business expenditure in the future. In view of these undertaking of the assessee and keeping in view, the provisions of Section 40A(3) as discussed hereinabove, we do not find any justification for the disallowance made during the year under consideration. Accordingly, we modify the order of both lower authorities and direct the Department to make disallowance by attracting provisions of Section 40A(3) only in the years in which assessee claims such payment as expenditure for arriving at its business profits. We direct accordingly.

14. From the above decision, it is clear that in that case, the assessee had not claimed expenditure in its profit & loss account. The reliance is also placed by the Ld. CIT(A) on the decision of Hon'ble Delhi High Court rendered in the

case of CIT Vs. Rhydberg Pharmaceuticals Ltd. 269 ITR

561. The Hon'ble High Court held as under:

“We may note that we are not of the view that obtaining a cheque or a bank draft is hazardous and cumbersome procedure. Suffice it to say that in the present case, the Tribunal was of the opinion that the payee insisted for cash payment as observed by the learned CIT(A) and further that the transactions were found to be genuine. We may also note that in Attar Singh Gurmukh Singh Vs. ITO (1991) 97 CTR (SC) 251 : (1991) 191 ITR 667 (SC), it is pointed out that terms of s. 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is up to the assessee to furnish to the satisfaction of the A.O. the circumstances under which payment, in the manner prescribed in s. 40A(3), was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received cash payment.”

15. Ld. Counsel for the assessee has also relied upon judgement of Hon'ble Allahabad High Court in the case of CIT Vs. Choudhary & Company (supra). It is stated by the Ld. Counsel for the assessee that the cash payment was made on insistence of the seller of the land. It is further stated that the amount is duly recorded in the sale deeds and there is no doubt raised about genuineness of the transaction by the authorities below. He therefore, submitted that in the light of the various case laws,

addition by invoking provisions of section 40A(3) of the Act was not justified. Looking to the totality of the facts and in view of the fact that the assessee had to make payment on the insistence of the sellers respectively and following the judgement of Hon'ble Rajasthan High Court in the case of Smt. Harishila Chordia Vs. ITO in 298 ITR 92 and more particularly in the case of Anupam Teleservices Vs. ITO in tax appeal No.556 of 2013 of Hon'ble Gujarat High Court, we do not see any reason to interfere in the finding of the Ld. CIT(A) and the same is hereby affirmed. Ground raised by the revenue is dismissed.

16. In the result, appeal filed by the revenue is dismissed and the cross objection filed by the assessee is also dismissed.

Order was pronounced in the open court on 28.12.2018.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 28/12/2018

VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard
file.

By order

Assistant Registrar, Indore